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FEDERAL COMMUNICATIONS COMMISSION
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CC Docket 98-147

In the Matter of

Deployment of Wireline Services Offering
Advanced Telecommunications Capability

**COMMENTS OF THE COALITION OF UTAH INDEPENDENT INTERNET SERVICE
PROVIDERS**

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SUMMARY

The Coalition of Utah Independent Internet Service Providers submits these comments, which summarize its members' experience with US WEST's Utah roll-out of its xDSL service, to show that anticompetitive conduct is a serious problem in advanced services markets. US WEST has bottleneck control over the local loop component of DSL service, but Utah ISP's compete with a US WEST affiliate in providing Internet access. US WEST has used its control to foreclose CLEC's from providing high speed data transport services. US WEST has also discriminated by delays in providing services to customers of Utah Coalition ISPs as compared with customers of its affiliate, and marketing and sales arrangements which favor its affiliate. There are particularly acute problems with joint marketing by US WEST and its affiliate, and with fair and equal access to network information. Such service discrimination is especially anticompetitive in fast-moving high technology markets where gaining early adopter customers is critical, where customers may find it difficult to switch, and where ISP's compete on quality and responsiveness of service.

The Commission should act by unbundling the components of DSL, and by requiring non-discriminatory services. Computer III requirements should remain in place as new technologies like DSL are introduced. And if the proposal to permit provision of advanced services through a separate subsidiary is adopted, unbundling and antidiscrimination requirements must remain. The Utah Coalition supports the suggestion of the ISP/C for a simple system to monitor compliance.

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INTRODUCTION AND BACKGROUND

The Coalition of Utah Independent Internet Service Providers ("CUIISP" or "Utah Coalition") is a Utah non-profit corporation consisting of twenty-seven Internet service providers ("ISPs") providing Internet access services throughout Utah.¹ US WEST Communications, Inc. ("US WEST") is an Incumbent local exchange carrier ("ILEC") offering local exchange services and other telecommunications services in Utah. US WEST offers Internet access services in Utah, through "uswest.net," an affiliated retail department selling Internet access services to consumers.

The Utah Coalition files these comments because the Coalition and its members believe that their experience in the roll-out of high speed Internet connectivity in Utah will benefit the Commission and its staff in reviewing the effect of discriminatory telecommunications service on competition in broadband information services, notably Internet access. US WEST has used its control of the local loop to try to stifle competition in broadband technologies that enhance Internet access.

Digital Subscriber Line ("DSL") service is designed to provide a digital voice and data

¹ ArosNet, Burgoyne Computers Inc., CastleNet, Coastlink, DirecTell, EagleNet Online, Fibernet, I-80, InfoWest, Internet Connect, Internet Technology Systems, inQuo, Konnections, NETConnect, Connect A Net, PCFastNet, PDQ Internet, Redrock Internet, SISNA, Software Solutions, Utah Internet Services, VitrexNet, Vyzynz, Wasatch Communications Group, WebIt!, Web Guy Productions, Western Regional Networks, Xmission, XPressweb.

connection over copper wires at speeds of 256 kbps and higher. Most customers who take DSL service will use it to increase the speed of their Internet data transmission. Although DSL-based service may be seen by consumers as a single Internet support service, on the supply side DSL has three components. There is the upgrade to the local loop, where this digital service is not compatible with an ordinary analog computer modem, but instead requires a special DSL modem on the end user's premises. Even then, at the other end of the local loop, a special switch, the digital subscriber line access multiplexer ("DSLAM"), must be installed to split voice (which will be routed to the telephone system) from data transport (which will be routed to the Internet). In Utah, the data is routed over US WEST's Asynchronous Transfer Mode ("ATM") network to an Internet service provider with compatible digital equipment. Finally, the ISP then transfers the data to and from the rest of the Internet.

As far as the Utah Coalition can tell, US WEST is the only Utah provider of the first component of DSL-based Internet connectivity: the segment running from the end-user over the local loop to the DSLAM switches.

**I. US WEST's Anticompetitive Practices in the Utah DSL Market Show the
Need to Prevent Discrimination in Providing Advanced Services**

From the Utah Coalition's perspective, the issues posed in this proceeding boil down to a fundamental question:

Will allowing the ILECs like US WEST to offer advanced telecommunications services through an unregulated but separate affiliate preclude discrimination in related information services like Internet access?

As will be seen, the answer here is “no”. Additional safeguards are required. To establish why, the relation of demand for high-speed Internet access (an information service) with supply of broadband such as DSL (an “advanced” telecommunications service) will be set out. Then we will show that proposals like the one here which serve to protect competition in telecommunications are necessary -- but not sufficient -- to protect competition in Internet access, as a form of information service. Because the markets are so closely tied, protecting Internet access must be considered when addressing the possible market structure in upstream telecommunications services like DSL.

A. Why Broadband Internet Connectivity Matters to Advanced
Telecommunications Services

The Utah Coalition’s argument turns on three simple, critical facts: the demand in the market for DSL is driven by demand for high speed Internet access; the supply of DSL runs through the bottleneck of the local loop; and, in their early emergent stages, high technology markets like DSL broadband are particularly vulnerable to being locked in by anticompetitive conduct.

The driver for home, home-office, and small business interest in DSL is the desire to cut

short the “World Wide Wait”. However, to meet the demand for high-speed Internet connectivity, the Utah Coalition ISPs must obtain last mile telecommunications services from US WEST, their competitor in supplying those Internet connectivity information services. At present, this competitor controls the only source of last mile transportation, the local loop.

Because advanced broadband services like DSL and Internet access are complementary, and both depend on last mile telecommunications, both are vulnerable to monopoly leveraging. Incumbent local exchange carriers like US WEST, or their affiliates, are, however, also competing in components of DSL and other broadband services, like data transport and Internet access. US WEST has not hesitated to use its control of the local loop to favor its affiliate ISP at the expense of the independent Utah Coalition ISPs.

The customers at risk in such newly-developing high technology markets are “early adopters”. These customers are critical to market penetration.² When such customers are lost to slow wholesale service, retail competition delayed is retail competition denied. In addition, the growing use of E-mail addresses and web page URL’s for personal and business identification inhibits switching from ISP to another. Similar considerations have driven the statutory requirement in Section 251(b)(2) that telephone numbers must become portable to the extent feasible. As the Commission has recognized,

² See Geoffrey Moore, Crossing the Chasm, the standard text on high technology marketing.

Number portability is essential to meaningful facilities-based competition in the provision of local exchange service because survey data show that customers are reluctant to switch carriers if they must change telephone numbers. In practical terms, the benefits of competition will not be realized if new facilities-based entrants are unable to win customers from incumbent providers as a result of economic or operational barriers.

In the Matter of Telephone Number Portability (Second Report and Order) CC Docket No. 95-116 (¶ 4)(August 18, 1997).

Simply put, the switching costs for Internet-related identification are no less of a barrier. The burden of notifying dozens, hundreds, or thousands of correspondents of a change in E-mail addresses or URLs locks customers in to the initial supplier of Internet access. This is all the more true for business customers, especially those with several locations and internal networks. The cost of reconfiguration, even for a dissatisfied customer, means that the ripple effects of unfair advantages at the market's early stages are felt long afterward.

To see that discrimination has occurred, it may be helpful here to consider the DSL market in Utah against the background of Computer III safeguards. In evaluating the adequacy of interconnection to sustain competitive access, the Commission has stated it will look to:

- systematic differences in service access;
- end-user perceptions of inequality; or

-- technical differences.

See Third Computer Inquiry, Order on Reconsideration, 2 FCC Rec. 3035, 3048 (1987).

B. How US WEST Has Provisioned DSL

The discrimination suffered by the Utah ISPs has taken two forms: denial or delays in service, and discriminatory sales and marketing practices. They will be treated in turn.

1. US WEST Has Denied or Delayed Access to Essential
Components of DSL Service to its Competitors.

As to competitive access, pursuant its state tariff, (with one exception) US WEST has refused to allow Competitive Local Exchange Carriers ("CLECs") to provide service for the data transport segment from the DSLAM switch to the Utah Coalition ISPs' premises and equipment. Under the tariff US WEST filed in Utah, US WEST is to be the sole provider of that circuit. (Attachment II). The FCC tariff filed for this service (Attachment III) is to the same effect.

This issue -- of competition in the data transport segment of DSL-based Internet access -- bears emphasis. Although US WEST told the Commission in earlier Section 706 dockets that it would make such interconnection available, it has relied on its Utah tariff to deny CLEC

provisioning of data transport (from DSLAM switches to ISP equipment) as part of DSL service.³

That Utah tariff states (emphasis added):

Section 8.1.2

D.

2. MegaCentral Access Link

The MegaCentral Access Link is a Company-provided physical connection between a disclosed ATM Central Office or MegaCentral Service Point, and the MegaCentral customer premises.

More recently US WEST has stated that it will abandon this position, purportedly in response to this Commission's rulings in the 706 dockets. US WEST has not, however, filed an amended tariff with this agency or in Utah to allow a CLEC to provide data transport as part of DSL-based service.

The Utah Coalition understands US WEST's earlier comments to state that interconnections would be available for such services.⁴ Those statements were incorrect. Until US WEST actually modifies its tariff, the statements are still incorrect. Although the discrepancy may

³ See Comments of US WEST, Inc., in CC Dkt. No. 98-78, Petition of the Association for Local Telecommunications Services ("ALTS") for a Declaratory Ruling Establishing Conditions Necessary To Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996 (June 18, 1998) at 28-34 (Enclosed in pertinent part as Attachment I).

⁴ Those cited above and enclosed as Attachment I.

simply be the result of miscommunications within the company, the inconsistency underscores the need for this Commission to be vigilant as to actual market practices when setting policy and enforcing rules in this sensitive area.

Until or unless there is competitive access to the data transport component (from the DSLAM switches to the ISP connection), US WEST will remain the monopoly provider of this service. Yet it has failed to identify capacity needs for ISP customers, who therefore cannot plan their own market development. US WEST has not been forthcoming about available circuit, switch, and port capacity.

US WEST has claimed that equipment is not available to support the DSL-based service requested by the retail customers of the Utah ISPs. US WEST knew, or should have known, that there were not sufficient capacity and facilities in place to assure that ISPs would be able to begin offering Internet access to customers through US WEST's MegaBit Service. At least one ISP waited for nearly two months to be connected to the ATM network after the request for connection had been made and the ISP's line had been in place at the connection point with US WEST. US WEST has, however, apparently had no trouble in making connections for the DSL services offered through its affiliate, uswest.net.

Other customers have experienced delays and difficulties in obtaining MegaCentral Links (i.e., equivalent private line transport connections) and MegaCentral Ports from US WEST.

US WEST knew how many ISP customers had requested the service and that it would need to provide them with high speed lines to support the MegaCentral service. Yet, it failed to do so, while continuing to provision its own ISP. As a result, Utah Coalition ISP's have lost DSL customers to US WEST's affiliate.

2. Discriminatory Provisioning, Sales, and Marketing Practices Have
Given Us WEST an Unfair Advantage in Customer Perception.

Several Utah Coalition ISPs already have been substantially delayed in entering the market for DSL-compatible Internet access service because of US WEST's initial refusal to allow a CLEC to provision data transport lines for DSL. A number of Utah ISPs had immediate access to CLEC fiber in April, 1998, but no access to equivalent US WEST data transport. These ISPs could have begun providing DSL-compatible Internet access in time to effectively compete with uswest.net, but for US WEST's refusal to allow a CLEC to provide data transport.

Moreover, while US WEST has knowledge of which parts of the loop are suitable for DSL, the competing ISPs do not. US WEST has not hesitated to use that knowledge for joint marketing with its affiliate to target potential customers with access to loops which will support DSL. This advantage stems directly from US WEST's control of the local loop. This situation presents the clear risk of discriminating in favor of uswest.net in using such targeting information.

US WEST has also taken advantage of its position as Utah's only provider of DSL on the local loop to market its affiliate's Internet access to end users. U S WEST has established a toll-free 1-888 number for potential DSL customers to call to order service. The voice mail menu greeting callers makes uswest.net the first option, relegating its competitors to a collective, and anonymous, second option. Although the customer is calling US WEST for DSL service, not the uswest.net Internet service, the voice mail menu creates a clear and unmistakable link between DSL and uswest.net, with an equally clear and unmistakably anticompetitive effect.

When a customer calls US WEST to sign up for DSL service, the customer is correctly informed that he or she must select an Internet service provider that can accommodate a DSL connection. US WEST sales representatives have used this customer contact to urge the customer to sign up with its affiliate for Internet service. Apparently, US WEST's customer representatives either have not known or were unwilling to tell the customers that there are other DSL-compatible ISPs. In at least one instance, US WEST informed a customer that a certain ISP was not DSL compatible when, in fact, the ISP had repeatedly but unsuccessfully sought connection to the US WEST high speed data network.

US WEST's protocol for marketing DSL is different for customers of uswest.net than for customers of other ISPs. A uswest.net customer, for example, can obtain DSL-based service and Internet access service with a single phone call to a friendly US WEST representative. Customers of other Utah ISPs must make at least one call to US WEST and another to the ISP if they want

comparable service.

A number of customers who have been willing to tolerate this inconvenience have been slammed by US WEST to uswest.net. ISPs' customers have been connected to uswest.net after the customers had specifically requested US WEST to connect the circuit to the independent ISP. In fact, the first customer to receive DSL service in Utah was slammed from a Utah Coalition ISP to US WEST's affiliate. Many telephone calls from both slammed customers and ISPs have been required to correct the problem. Slamming is overtly and egregiously anticompetitive, suggesting the need for stringent protective measures, rather than after-the-fact penalties.

Finally, US WEST has given the use of its brand name to its Internet access affiliate. The millions of advertising and other promotional dollars invested in corporate good will now constitute an asset for the affiliate in customer (and other end-user) name recognition.

Such anticompetitive conduct must be reined in. DSL, as the prototype of the advanced services being considered in this docket, requires safeguards to promote competition until genuine market forces can emerge. Fortunately, the tools -- in the form of Computer III unbundling and antidiscrimination requirements -- for DSL are in place. What is needed is enforcement of those requirements, and the application of those tools to other advanced services, as necessary.

II. DSL and Similar Advanced Services Should be Unbundled and Offered Without Discrimination.

A. The Commission Should Rule That DSL Is Subject to Computer III Requirements.

As a useful first step, the Commission should make it clear that the local loop segment of DSL telecommunications service falls within the requirements of Computer III. A straightforward way to do this would be a ruling that DSL, as “a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information,” is a basic service under Computer II. Second Computer Inquiry, 77 FCC 2d 384, 420 (1980).⁵

This is consistent with Commission precedent for packet-switched transmission. See Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 2449, 2460 n.28 (1988) (“[Accunet Packet Service] is a packet-switched data transmission service that does not include protocol processing and is classified as a basic service.”) Just like other basic services DSL is pure

DSL also comes within the definition of “telecommunications” set out in the Telecommunications Act of 1996: “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). We understand that the Commission to have done this in ¶ 35 of the Memorandum Opinion and Order initiating this proceeding. For purposes of this pleading, the two definitions are coextensive. The ruling requested here by the Utah Coalition would supply an affirmative answer to the issue noted in fn. 56 of ¶ 35 of the Memorandum Opinion and Order.

transport, appropriately subjected to common carriage regulations.

The ruling requested by the Utah Coalition simply restates the common law principles codified in Section 202. It is unlawful for a common carrier “to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services,” or “to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.”⁶ Applying these principles to the DSL market in Utah means that US WEST may not deny essential services to a competing ISP, or discriminate against that ISP while providing that service to its unregulated affiliate. The Commission’s Memorandum Opinion and Order makes this point, that non-discriminatory access is a “continuing obligation” (¶37), but the Utah Coalition has not yet seen it in practice.

Hence, the Commission should rule that DSL must be unbundled and made available to competitors, at cost-based rates and on non-discriminatory terms and conditions. Moreover, under the requirements of Section 251, the ILEC must also be required to unbundle the data hauling component of DSL (from DSLAM switches to Internet access points), and make comprehensive access available to CLECs.

US West’s denial of access and other discriminatory practices in Utah underline the need

47 U.S.C. § 202(a).

for application of these requirements. US West has bundled data transport supply with access to the DSL enhancement of the local loop. As to the Internet access portion of DSL, by delays, and discrimination in service and in marketing, US WEST has given its affiliate a head-start in the market for broadband Internet access.

B. Computer III Access and Anti-discrimination Requirements Must Apply
Regardless of Whether and How the Structural Separation Option is
Chosen.

The Commission has proposed that ILECs such as US West could be allowed to offer DSL services through separate affiliates, with structural separation akin to that required under Computer II. The crux of the proposal is that the affiliate would be free of some statutory obligations arising under Section 251, with the objective of protecting competition in communications services (for present purposes, basic services under the nomenclature of Computer II). As the Utah Coalition understands it, the idea is to keep the retail exchange telecommunications markets competitive as new technologies are introduced.

However, this structural separation will not protect ISP's which are not themselves CLECs, such as the Utah Coalition ISPs. Such ISPs are not granted access rights pursuant to section 251, which are the focus of the structural separation requirements at issue here. Therefore, the structural safeguards being considered here will not, without more, serve to protect competition in information services ("enhanced" services), including Internet access. Unbundling

and antidiscrimination requirements are needed for information services as well. Hence the response to the query in ¶¶ 37 and 49 of the NPRM should be to extend these requirements in the regime under discussion.

The experience with DSL in Utah as a test case bears this out. Although US West purports to offer DSL pursuant to Computer III, obligations, US West has nonetheless bundled DSL with data transport and discriminated in providing DSL services.⁷ The Commission needs to make it clear that Computer III requirements apply to DSL, as the prototypical advanced service.

It can do so by adopting the suggestion made in that non-CLEC, independent ISPs have the same “section 251-type unbundling” access rights as CLECs. Computer III Further Remand Proceedings, 13 FCC Rcd 6040, 6091 (1998). But more is needed, because there is an additional risk of discrimination depending on where within the corporate structure advanced telecommunications services (like DSL) and information services (like Internet access) are located. The dominant carrier and its affiliates might try to argue that only the regulated carrier is subject to the Computer III unbundling and nondiscrimination requirements, and that an affiliate providing both DSL and ISP services need not offer DSL at nondiscriminatory rates — or offer it at all — to independent ISPs.

The Utah Coalition understands filing a DSL Tariff purportedly pursuant to an amendment to a CEI plan as tantamount to recognizing obligations under Computer III. See Attachment III.

The ILECs should not be permitted to play such a shell game, which would move -- rather than remove -- anticompetitive conduct. From the perspective of an independent ISP as a competitor in information services, the abuses are no different. Additional safeguards are required and Computer III requirements should apply regardless of how DSL and ISP services are distributed within the family of the local monopoly carrier and its corporate affiliates.

C. The Transfer of Intangible Assets Such as Network and Customer Information and Brand Names Must be Addressed.

The experience of the Utah Coalition ISPs suggests that two other corporate assets -- network information and brand names -- must be considered as part of any structural approach to mitigating market power as new technologies are introduced.

The first of these assets, network information, arises from control of the network. Prior access to this network information constitutes a competitive advantage. For example, prior access to information on DSL-qualified local loops gives an ILEC or its affiliates a head start in targeting potential customers on those loops for marketing. Another example is prior knowledge of when and where capacity on DSLAM switches will be available. The Utah Coalition suggests that some combination of (intra-corporate) "Chinese wall" requirements and (extra-corporate) competitive disclosure requirements may be needed for such network information. And equal access to information means timely access to information, and may mean delaying a service until

all are at the starting gate.⁸ How these requirements will be mixed and matched to the needs of competition will depend on whether and how the corporate affiliate providing advanced telecommunications services (like DSL) is allowed to provide information services (like Internet access).

A second, related point, as noticed in ¶113 of the NPRM, is the use of corporate brand names. The Utah Coalition has learned through its members' experience that brand names confer a competitive advantage on the ILEC's ISP affiliate. The advantage is amplified by two factors arising from switching costs: one specifically present in Utah, the other generic.

US WEST has made sure that once customers sign up with uswest.net, they will be reluctant to leave for another ISP. US WEST's DSL price list originally included a "MegaSubscriber Change Charge" of \$75.00, a striking negative incentive to change providers. This is nothing more than another barrier to the ISPs' entry into the market for DSL subscribers. US WEST has since reduced the charge to \$45.00. This is still a significant sum: the anticompetitive disincentive remains firmly in place.

More generally, the significant switching costs described above imply that the playing field

These comments are responsive to the queries on parity of access to loop data in ¶¶ 157-158 of the NPRM portion of the Memorandum Opinion and Order. However, the fair and equal access to loop information described there for telecommunications competitors, i.e. CLECs, must also extend to other competitors, like ISPs.

should be level in the first place. Therefore, there should be a strong presumption against the transfer of brand names from ILECs to affiliates. Where the same affiliate is both offering Internet access and other advanced communications services, the Utah Coalition suggests the presumption should be irrebuttable, and transfer of brand names should be forbidden.

D. The Commission should Adopt A Procedure For Public Monitoring of Compliance with Antidiscrimination and Access Requirements.

The Utah Coalition ISPs have had a lot of experience in a very short time with discrimination in access, provisioning, and marketing practices, through which US West, as supplier of DSL, favors its affiliate at the expense of its competitors. Even though these practices are anticompetitive and thus contrary to statutory policy, and may also be in violation of federal regulatory requirements, as a practical matter the rules may not always be enforced.

Taken separately, delays in responding to a competitor's request, or misuse of network and customer information, may not warrant the cost and burden of instituting formal proceedings, here or at the state level. Taken together, especially as a new service is introduced, such incidents may have a considerable anticompetitive effect, as a succession of lost customers cascades into a foreclosed market.

Hence, the Utah Coalition specifically endorses the Internet Service Providers' Consortium

proposal in this regard. The ISP/C has suggested

Specifically, ISP/C proposes that the Common Carrier Bureau add an area to its Internet web page in which an ISP can electronically lodge copies of protests sent to the local RBOC or GTE, in cases where the ISP believes the carrier has not fulfilled its obligations. Accompanying the document would be a list of key terms including name of the ISP, name of the carrier, location, service at issue, date, and a few words summarizing the allegation. The web page would automatically assign a case number. The RBOC or GTE would be encouraged to lodge a copy of its reply, if any, under the same case number, and the ISP could continue the exchange if necessary. The depositary would be available for public inspection, with participants asked not to post material they identify as proprietary or otherwise entitled to nondisclosure under the Freedom of Information Act.

The proposal, at a very slight burden to the Commission, has many advantages:

- creating incentives to address and resolve (or at least explain or deny) concerns;
- creating readily available data for early identification and rectification of emerging patterns and practices of discrimination;
- facilitating dispute resolution, either without litigation, or by accelerating Section 208 pre-complaint processes; and
- disseminating performance and quality of service data to customers and potential

competitors in these emerging markets.

CONCLUSION

US WEST has not hesitated to leverage its control over the local loops to foreclose competition in other components of DSL-based high speed Internet access. Independent ISPs like the members of the Utah Coalition and nascent broadband markets like DSL are vulnerable to denial of access or service discrimination like that described here.

The Commission should act by unbundling high speed data transport from telecommunications services from end-user to the central office switch, and by requiring non-discriminatory services where competition in DSL-based services is not feasible. Computer III requirements should remain in place as new technologies like DSL are introduced. And if the proposal to permit provision of advanced services through a separate subsidiary is adopted, unbundling and antidiscrimination requirements must remain. The Utah Coalition supports the suggestion of the ISP/C for a simple system to monitor compliance.

Respectfully submitted,

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ATTACHMENT

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Utah
CUIISP
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ATTACHMENT A

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Conditions Necessary To Promote Deployment of) CC Dkt. No. 98-78
Advanced Telecommunications Capability Under)
Section 706 of the Telecommunications Act of 1996)

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